No. 95-[illegible]
(Consolidated with No. 95-[illegible])

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALLIANCE FOR COMMUNITY MEDIA,
ALLIANCE FOR COMMUNICATIONS DEMOCRACY,
and PEOPLE FOR THE AMERICAN WAY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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RULE 29.6 NOTATION

Respondent has no parent companies or subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-227
(Consolidated with No. 95-124)

ALLIANCE FOR COMMUNITY MEDIA,
ALLIANCE FOR COMMUNICATIONS DEMOCRACY,
and PEOPLE FOR THE AMERICAN WAY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), an intervenor in the court below and a respondent in this Court, files this brief supporting affirmance of the *in banc* decision of the United States Court of Appeals for the District of Columbia Circuit. NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of cable television systems serving more than 80 percent of the nation's approximately 60 million cable households. Its members also include cable programmers, cable equipment manufacturers, and others interested in or affiliated with the cable television industry. On behalf

of its members, NCTA participated in the Commission's rulemaking proceeding leading to adoption of the rules under review.[1]

STATEMENT

The primary issue in this case that we address is whether the *in banc* Court[2] was correct in concluding that Congress' decision to return to cable operators editorial discretion over certain access programming does not constitute "state action" subject to First Amendment scrutiny. In particular, NCTA respectfully submits this brief in response to Petitioners'[3] argument that, insofar as Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Act")[4] and the implementing regulations of the Federal Communications Commission ("FCC" or "Commission") grant cable operators the right not to carry indecent programming on access channels, those provisions violate the First Amendment.[5]

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[1] *See* Comments of the National Cable Television Association, MM Dkt. No. 92-258 (filed Dec. 7, 1992), J.A. 244; NCTA Reply Comments, MM Dkt. No. 92-258 (filed Dec. 21, 1992), J.A. 349.

[2] The *in banc* decision is reported at 56 F.3d 105 (D.C. Cir. 1995) and is reprinted in the appendix to the Petition for a Writ of Certiorari in No. 95-124 at App. 20. Citations to "App. ——a" refer to that appendix.

[3] This brief responds to the briefs filed by Petitioners Alliance for Community Media, Alliance for Communications Democracy, and People for the American Way (in Case No. 95-227) ("Alliance Br.") and Petitioners Denver Area Educational Telecommunications Consortium, Inc. and American Civil Liberties Union (in Case No. 95-124) ("DAETC Br.") (collectively "Petitioners") to the extent they raise the narrow "state action" argument we address herein.

[4] 47 U.S.C. §§ 531 *et seq.*

[5] We are not addressing the issue of the constitutionality of the underlying access requirements. That issue is being addressed in another case currently pending in the United States Court of Appeals for the District of Columbia Circuit. *Time Warner Enter-*

The 1992 Act changed certain fundamental policies with respect to the provision of access channels—both public, educational and governmental ("PEG") access channels and leased access channels—on cable television systems. Under previously existing law,[6] cable operators were expressly barred from exercising private choices in contracting with access programmers; they were prohibited from editing, restricting or determining the content of access programming.[7] Those who provided programming on access channels were legally responsible for that programming with respect to, for example, defamation or obscenity. The cable operator, on the other hand, was immune from any such liability.[8]

The new law continues to allow local government franchising authorities to impose PEG access requirements, and it continues to require the provision of leased access channels. For the most part, cable operators are still prohibited from editing the content of access programming. But Sections 10(a) and 10(c) of the 1992 Act return to cable operators a limited amount of editorial discretion—*i.e.*, their freedom as private (nongovernmental) actors—with respect to certain types of programming on access channels.

Specifically, the Act gives cable operators the freedom to choose not to carry PEG access programming that contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."[9] It also gives operators the freedom to choose not to carry programming that they "reasonably believe[] describes or

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tainment Company L.P. v. FCC (No. 93-5349 and consolidated cases).

[6] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (1984), 47 U.S.C. §§ 521 *et seq.* (the "1984 Act").

[7] 47 U.S.C. § 531(e); *id.* at § 532(c)(2).

[8] *Id.* at §§ 558 and 559.

[9] 1992 Act at § 10(c).

depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." [10] At the same time, however, the Act imposes new responsibilities and liabilities on cable operators. They are no longer protected against liability under obscenity laws if obscene material is provided on access channels.[11] Furthermore, if the cable operator does not institute a policy regarding indecent programming under Section 10(a), then it is subject to Section 10(b) under which it must carry such programming on a separate channel, which is made available only to those subscribers that affirmatively request it.[12]

Petitioners contend that these provisions, and the implementing regulations adopted by the FCC, constitute a "censorship" scheme.[13] They claim that, as programmers desiring to use, or as viewers wishing to watch, access channels, their First Amendment rights are violated since they are no longer able to force cable operators, regardless of the operator's wishes, to provide indecent access programming. But, as the *in banc* court recognized, their argument rests on a fundamental mischaracterization of the government's action here. Sections 10(a) and (c) do not ban (or mandate) any programming on access channels. Rather, they allow cable operators not to carry such programming if they would prefer not to do so. As we show below, the exercise of that editorial discretion

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[10] *Id.* at § 10(a).

[11] *Id.* at § 10(d). That aspect of the statutory scheme itself raises constitutional issues. *See Time Warner Entertainment Company L.P. v. FCC* (No. 93-5349 and consolidated cases).

[12] 1992 Act at § 10(b); 47 C.F.R. §§ 76.701(b) and (c).

[13] *See e.g.*, DAETC Br. at 11-12 ("[Section] 10 . . . establishes the Commission as a joint participant in the censorship scheme."); Alliance Br. at 3 ("Congress has . . . creat[ed] a content-based scheme that enlists private parties—specifically, cable operators—to take the ultimate action to censor the disfavored speech.")

does not transform a private cable operator's judgment into a First Amendment violation.[14]

SUMMARY OF ARGUMENT

Allowing cable operators discretion not to carry "indecent programming" on access channels is not the same as the government prohibiting (or mandating) the carriage of any specified programming. The exercise of editorial discretion by cable operators does not constitute "state action": a core meaning of the First Amendment is that private actors' freedom to edit their own organs of speech does not derive from a government grant. And there is no state compulsion or joint private/government action where an operator privately exercises editorial discretion. Moreover, access channels do not constitute "public fora" because—as part of a cable operator's system—they are private property. Sections 10(a) and (c) do not violate the First Amendment because they impose no government restriction on the freedom of choice exercised by editors in the private marketplace for speech: the provisions permit cable operators to exercise the same rights with respect to access channel speakers as they do with respect to other speakers voluntarily carried on their systems.

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[14] With respect to indecent leased access programming, Section 10 and its implementing regulations require cable operators who do not adopt a policy regarding indecent programming to block its access unless a subscriber, 18 years or older, affirmatively requests it. 1992 Act at § 10(b); 47 C.F.R. §§ 76.701(b) and (c). We express no view herein about the constitutionality of the leased access mandatory blocking requirement. There are no similar restrictions that mandate an operator block indecent PEG access programming.

ARGUMENT

I. SECTIONS 10(a) AND (c) DO NOT PROHIBIT INDECENT PROGRAMMING ON ACCESS CHANNELS

As Petitioners correctly point out, "[u]ntil this case, the courts had unanimously held that restrictions on 'indecent' cable programming violate the First Amendment." [15] This Court has made clear, moreover, that indecency is protected speech and, indeed, that strict scrutiny applies broadly to strike down content-based efforts to single out "indecent" but non-obscene speech for government-imposed bans or other direct impairments of private choices. *See Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115 (1989). But Sections 10(a) and (c) do not fail under that body of law.

Congress has not banned indecent access programming here. Indeed, Sections 10(a) and (c) do something quite different from any governmental prohibition or requirement of carriage, or other direct restrictions on carriage choices. Unlike those measures, Sections 10(a) and (c) do not have the effect of making the government, as opposed to private free-market actors, responsible for what speech is disseminated. These provisions restore, rather than impair, private freedom. Thus, Congress in Sections 10(a) and (c) has returned to cable operators the ability to exercise a limited measure of editorial control over programming presented on the access channels of their cable systems.

Section 10(a) of the 1992 Act "permit[s] a cable operator to enforce prospectively a written and published

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[15] DAETC Br. at 39 n.55. *See, e.g., Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982).

policy of prohibiting" indecent programming on leased access channels.[16] Section 10(c) of the 1992 Act provides that the Commission, by regulation, shall "enable a cable operator" to prohibit indecent programming on PEG access channels.[17] Under this regime, cable operators may choose to allow indecent programming to air over access channels, or they may choose to prohibit it. That choice to prohibit it would be an exercise of private journalistic discretion protected by the First Amendment, not government-compelled action, as the Petitioners allege.

As a general proposition, whether a cable operator chooses to air a program is entirely committed to its discretion. As this Court recently affirmed, a cable operator " 'exercis[es] editorial discretion over which stations or programs to include in its repertoire.' " [18] The exercise of editorial discretion, if anything, means that cable operators have the right to make decisions about what programming to carry. While Petitioners may disagree with that ultimate judgment, "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence." [19]

It is government limits on that discretion in the first instance that raise First Amendment concerns.[20] As this Court recognized in reviewing an FCC-imposed access requirement in the 1970's, "even when not occasioning the displacement of alternative programming, compelling cable operators indiscriminately to accept access programming will interfere with their determinations regard-

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[16] 1992 Act at § 10(a), 47 U.S.C. § 532(h).

[17] 1992 Act at § 10(c), 47 U.S.C. § 531.

[18] *Turner Broadcasting System, Inc. v. FCC*, —— U.S. ——, 114 S.Ct. 2445, 2456 (1994), *quoting Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494, 106 S. Ct. 2034, 2037 (1986).

[19] *Id.* at 2458.

[20] *See id.* at 2458-59.

ing the total service offering to be extended to subscribers."[21] This intrusion into the editorial discretion of cable operators has been held unconstitutional by several courts.[22]

In short, allowing cable operators the discretion not to carry indecent programming on access channels—a discretion they would have in the *absence* of government intervention—is not the same as the government prohibiting the carriage of such programming or otherwise interfering with private free choice. Under the 1984 Act, the determination as to whether "indecent" programming would or would not be carried on access channels was made by the government. Under the 1992 Act and FCC rules, that determination can be made by the cable operator. To suggest that Congress cannot return such editorial discretion to the cable operator without violating the Constitution stands the First Amendment on its head.

II. CABLE OPERATOR EXERCISE OF EDITORIAL DISCRETION IS NOT STATE ACTION

No cable operator action denying access to programmers desiring to air indecent material on leased or PEG access channels is at issue in this case, and Petitioners have made clear that their dispute is not with any cable operator action.[23] Nevertheless, Petitioners contend that

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[21] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 n.17 (1979) (striking down FCC access rules adopted in 1976 on jurisdictional grounds).

[22] *See, e.g., Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Group W Cable, Inc. v. Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987); *Century Federal, Inc. v. Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987).

[23] Alliance Br. at 22 ("But whether private cable operators are state actors when they censor indecent speech need not be decided here. This suit is directed against state actors—the United States and the FCC—and challenges on its face a content-based law put in place by those actors"); DAETC Br. at 19 ("The issue is

returning to cable operators their "pre-governmental" right to exercise editorial judgment whether to air indecent material on access channels constitutes a First Amendment violation because an operator exercising that discretion would be engaged in state action.

"That 'Congress shall make no law . . . abridging the freedom of speech, or of the press' is a restraint on government action, not that of private persons." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 114 (1973) ("*CBS v. DNC*"). There are, as Petitioners' briefs point out, limited exceptions to that principle where a private actor is deemed to be a state actor for certain purposes. But those exceptions are inapplicable to the carriage decisions of cable operators, particularly if due regard is given to the "sensitive constitutional issues inherent in deciding whether a particular" speaker's action is itself subject to First Amendment restraints.[24]

Petitioners claim that the scheme adopted pursuant to Section 10 "significantly encourages" cable operators to ban indecent material from access channels.[25] This Court has made clear, however, that "even extensive regulation by the government does not transform the actions of the regulated entity into those of the government."[26] Instead, this Court has articulated a two-prong test. First, a private person must be "exercis[ing] some right or privilege created by the State. . . ."[27] Second, that person also must be found to be a "state actor" because he is acting

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whether Section 10 violates the Constitution, not whether particular censorship decisions of cable operators would be state action").

[24] *CBS v. DNC*, 412 U.S. at 115 (finding no state action in television broadcaster's refusal to air particular programming).

[25] Alliance Br. at 27 and DAETC Br. at 24 (both citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)).

[26] *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 544 (1987).

[27] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

under "state compulsion"; engaging in "joint action" with government officials; or performing a "public function."[28] An operator's action refusing to carry indecent programming would not be state action under this test.

Initially, as described *supra*, the First Amendment's fundamental commitment to *private* speech choices means that an operator's exercise of editorial discretion is not the exercise of a government-created right. That is enough to end this inquiry. But even assuming that the exercise of editorial control might be deemed to satisfy the first prong of the test, a cable operator falls within none of the categories established under the second prong. There is plainly no state compulsion or joint private/government action when an operator privately exercises editorial discretion. Indeed, there is no evidence here that an operator choosing not to air indecent leased or PEG access programming will make that choice on any basis other than its own independent judgment. And the idea that the exercise of editorial discretion is a traditional *public* function is exactly opposite to the First Amendment principle that editorial judgment is to be protected from government control.

Petitioners' arguments to the contrary are wholly speculative. First, what Petitioners point to as "significant encouragement" is in essence the return of editorial discretion not to carry indecent access programming itself.[29] But "[t]he First Amendment does not reach acts of private parties in every instance where the Congress or the Commission has merely permitted or failed to prohibit

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[28] *Id.* at 939.

[29] *See* Alliance Br. at 28-29. To the extent that Petitioners argue that Section 10(b)'s leased access blocking requirement provides such a strong financial incentive for operators to ban indecent leased access programming that the government has become responsible for the choice (Alliance Br. at 29, DAETC Br. at 14 n.17), the remedy should be to strike down the mandatory blocking requirement, not to continue to strip operators of editorial control over their channels.

such acts."[30] The mere fact that Congress and the FCC have now removed the prohibition on cable operators exercising their judgment as to particular programming does not mean that those operators are required to act in a particular manner.[31]

Second, Petitioners attempt to find "significant encouragement" insofar as Congress, in Section 10(d) of the 1992 Act, "partially revoked the immunity from liability that these operators had enjoyed under the 1984 Act with respect to access programming."[32] But Section 10(d) deals with liability for obscene, not indecent, programming. And, in any event, operators are insulated from liability for airing obscene access channel programming in the absence of actual knowledge to the contrary. The Commission has explained that operators who do not have "actual knowledge" that the programming on their access channels is obscene would "otherwise [be] immune from prosecution for violations of obscenity laws."[33]

Finally, Petitioners also contend that access channels constitute a "public forum" and, for that reason, restoring a cable operator's editorial discretion with respect to these

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[30] *CBS v. DNC*, 412 U.S. at 119.

[31] *See generally Carlin Communications, Inc. v. Mountain St. Tel. & Tel. Co.*, 827 F.2d 1291, 1296-97 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988) (finding termination of service to be state action where carrier was threatened by state with prosecution for carrying "adult entertainment" messages, but finding no state action where carrier itself adopted policy excluding all "adult entertainment" messages).

[32] Alliance Br. at 29-30; DAETC Br. at 14 n.17.

[33] *First Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, FCC 93-72, 8 FCC Rcd 998, 1005 ¶ 43 n.39 (1993) (App. 151a). *Accord, id.* at 1006 ¶ 50 n.42 (App. 155a). *See also id.* at 1007 ¶ 51 n.43 (App. 156a) (where programmer certification that programming was not indecent is erroneous, operator is immune from obscenity prosecution.)

channels warrants First Amendment scrutiny.[34] But Petitioners primarily rely on snippets of legislative history and prior FCC discussions that describe only public, not leased, access channels.[35] In any event, it would be a remarkable expansion of the public forum doctrine—and a dramatic form of bootstrapping argument—to find it applicable based on *compelled* access to *private* property for a *limited category* of users. And that is the case with access channels where the limited amount of "public" access was mandated by government in the first place. Access channels are not generally voluntary creations: leased access is mandated by Section 612 of the 1984 Cable Act; PEG channels are sanctioned by federal law and can be imposed as a condition of obtaining a franchise.

Thus, the *in banc* court was correct in stating that access channels do not fall into any of this Court's categories of "public forum" cases:

> As Petitioners and everyone else knows, these channels are not government owned. The channels belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers.[36]

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[34] Alliance Br. at 32-35. *See also* Brief for New York City Petitioners.

[35] *See* Alliance Br. at 33 citing *Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251*, 87 F.C.C. 2d 40, 41 (1981).

[36] App. 28a-29a. New York City Petitioners (at 23 n.19) cite two cases for the proposition that "at least two federal district courts have recognized that public access channels are public fora." But in each case, the statements were dicta, not related to the court's holding. In *Altman v. Television Signal Corp.*, 849 F. Supp. 1335, 1342 (N.D. Cal. 1994), in ruling on a motion for a preliminary injunction, the Court's "state action" holding was based on the theory that the statute "significantly encouraged" the cable operator's action, not on a "public forum" theory. And in *Missouri Knights of the Ku Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347 (W.D. Mo. 1989), the court, in denying a motion to dismiss, did not hold that the

More generally, as the *in banc* court concluded (App. 15a-16a):

> To suppose that whenever Congress restores to cable operators editorial discretion an earlier statute had removed, the operators' exercise of this discretion becomes state action subject to the First Amendment, not only would disable the legislature from correcting what it perceives as mistakes in legislation, but also would deter it from experimenting with new methods of regulating. No analogous state action decision of the Supreme Court . . . has ever gone so far.

III. SECTIONS 10(a) AND (c) RESTORE TO CABLE OPERATORS THE SAME RIGHTS WITH RESPECT TO INDECENT ACCESS PROGRAMMING THAT THEY MAINTAIN ON THEIR OTHER CHANNELS

Petitioners also argue that Sections 10(a) and (c) violate the First Amendment because, they claim, it entails "speaker-based discrimination" insofar as they apply only to access channels and not to channels over which operators currently exercise editorial control. Alliance Br. 41-43. But this argument rests on a fundamentally mistaken concept of discrimination. Insofar as Sections 10(a) and (c) permit them to decide whether or not to carry indecent access programming, cable operators can now exercise the same rights with respect to access channel speakers as they do with respect to other speakers voluntarily carried on their systems. By contrast, forcing cable operators to continue to carry indecent access programming which they would not otherwise choose to carry discriminates *in favor of* access programmers.

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city's decision to return all editorial discretion over the public access channel to the cable operator necessarily violated the First Amendment. It merely "assume[d] for the sake of argument" that the public access channel was a designated public forum and sufficient First Amendment concerns were raised to survive a motion to dismiss. *Id.* at 1352.

As this Court has explained, "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material." [37] That operators may determine to prohibit some, but not all, indecent programming from their system in the exercise of their editorial judgment does not violate the Constitution. Instead, it is an editorial process protected by the First Amendment.

CONCLUSION

For the foregoing reasons, Sections 10(a) and (c) of the 1992 Cable Act and the Commission's implementing rules, to the extent that they allow cable operators not to carry indecent access programming, should be upheld and the *in banc* judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[37] *CBS v. DNC*, 412 U.S. at 124-25.